



Fourth Circuit Declines to Take a Restrictive View of Forfeiture by Wrongdoing

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I've previously discussed the forfeiture by wrongdoing exception to the confrontation clause in this blog ([here](#)) and in numerous other publications (for example, [here](#)). In a nutshell, the forfeiture by wrongdoing exception extinguishes confrontation claims on the equitable grounds that a person should not be able to benefit from his or her wrongdoing. Forfeiture by wrongdoing applies when a defendant engages in a wrongful act that prevents the witness from testifying, such as threatening, killing, or bribing the witness. When the doctrine applies, the defendant is deemed to have forfeited his or her confrontation clause rights. Put another way, if the defendant is responsible for the witness's absence at trial, he or she cannot complain of that absence.

In a recent case, *United States v. Jackson*, 706 F.3d 264 (4th Cir. 2013), the Fourth Circuit declined the defendant's invitation to take a narrow view of this equitable doctrine. In *Jackson*, the defendant was charged with murder, drug, and firearm offenses. The defendant was the leader of a local drug ring. Unfortunately for the victim, he got on the defendant's bad side. In addition to stealing money and drugs from one of the defendant's associates, the victim was known for selling fake drugs in the area, thus putting a damper on the defendant's drug trade. All of this led to a confrontation between the defendant and the associate on one side and the victim on the other. During this confrontation the defendant's associate shot at the victim but missed and the victim escaped. Later, and while in custody on an unrelated matter, the victim gave officers information about the attempt on his life, fingering both the defendant and his associate as the perpetrators. Word got to the defendant that the victim was "telling everything" to the police and after the victim was released from custody, he was attacked and killed by a masked assailant. When asked about the victim's death by a member of his drug operation, the defendant said that the victim "was an informant trying to bring down him and his brothers" and that the victim "deserved" to be killed. The defendant was charged with the victim's murder.

Before trial, the prosecution filed a motion in limine seeking to admit the victim's written statement to police describing the defendant's involvement in the attempt on the victim's life. The government argued that the defendant forfeited his right to confront the victim by killing him with the intent to make him unavailable as a witness. The trial court found that the defendant's desire to silence the victim was a "precipitating" and "substantial reason" for the murder and granted the prosecution's motion to admit the victim's statement. The jury found the defendant guilty and he appealed.

On appeal the defendant argued that the forfeiture by wrongdoing exception does not apply unless a defendant's *sole* motivation in making a witness unavailable was to prevent that witness's testimony. Here, the defendant argued, he had additional reasons for killing the victim: to prevent him from undercutting the defendant's drug operation and to get revenge for stealing from his associate. The Fourth Circuit looked to controlling precedent and found no support for the defendant's "restrictive view" of the forfeiture by wrongdoing exception. Additionally, the court reasoned, such an approach "finds no support in the functional needs of our criminal justice system" and accepting it "would play roulette with the safety of cooperating witnesses." It explained:

Eroding the forfeiture-by-wrongdoing exception risks not only giving defendants an intolerable incentive to bribe, intimidate, or even kill witnesses against them. It also provides a disincentive for witnesses themselves to come forward and testify. While the Confrontation Clause is fundamental to our conception of a fair and just system of

criminal adjudication, so also is the vigorous and candid participation of relevant witnesses. Accepting [the defendant's] proposition would throw the system off kilter by hindering factual development in criminal prosecutions. That, too, would prevent the adversarial process from playing out as the Framers intended.

(quotation and citations omitted). Thus, the court held, the forfeiture by wrongdoing exception applies when a defendant intends to prevent a witness from testifying; the fact that the defendant may have had other motivations for harming the witness is irrelevant.